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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-616

J. ELBERT PETERS; DR. WILLIAM H. GRAHAM; JAMES W. TICE; and WYLEY D. WARD, individually and on behalf of all those similarly situated,

Petitioners,

v.

DUDLEY CLARK, EDWIN JONES, JAMES BELL, LAWRENCE COBB, and JAMES RECORD, Chairman, as members of the Madison County Board of Commissioners of Madison County, Alabama; Ashford Todd, Judge of Probate of Madison County, Alabama; Jerry Crabtree, Sheriff of Madison County, Alabama; Alvin Blackwell, Chairman of the Madison County Democratic Executive Committee; and Lawrence R. Judd, Chairman of the Madison County Republican Executive Committee,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The statement of petitioners on Page 2 of their petition under "Opinions Below" is correct.

The statement under "Jurisdiction" is correct.

The "Question Presented for Review" is too restrictive, and for that reason it is challenged.

The quotation from the State statute under which the five members of the Madison County, Alabama, Commission were elected (Act 1739 of the 1971 Legislature) is correct. As noted, the Act provides for election of the commissioners in the general election of 1972 and at the general election every four years thereafter. The next general election will not occur until November 1976. This fact, with other reasons stated herein, has a bearing upon whether this Court should now grant the petition before the opinion of the Fifth Circuit is rendered.

STATEMENT OF THE CASE

All five Madison County commissioners are elected at large by the voters of the entire County. One commissioner is elected from each of the five residential districts, and while there is a disparity in population among the districts, all commissioners, whether from urban or rural districts, are elected at large.

On Page 4 of the petition it is alleged that for the fiscal year ending September 30, 1971, out of one of many funds (i.e., bridge and road fund) 89% of that fund was spent in four districts and 11% in the fifth. Petitioners fail to state that the fiscal year referred to began October 1, 1970, prior to the County-wide election of commissioners in 1972 held pursuant to Act 1739 of the 1971 Legislature of Alabama, General Session. Petitioners also fail to note that the testimony at trial established that bridge and road funds are no longer divided by districts and that the expenditures in District 5 (the County's district with the largest population) amounted to approximately 80% of the total expenditures from the largest single fund administered by the Commission, the General

Fund. The trial before Judge Lynne, the District Judge, was held on December 14, 1971, before the 1972 election. At that trial there was not and could not be any issue as to whether under Act 1739 there would be invidious discrimination in practice. The election plan set forth in Act 1739, at-large voting with residency requirements, met constitutional requirements. As stated in *Dusch* v. *Davis,* 387 U.S. 105, 18 L.Ed.2d 650, 87 S.Ct. 1549:

> [T]he present consolidation plan uses boroughs in the city "merely as the basis of residence for candidates, not for voting or *representation.*" He is nonetheless the city's, not the borough's, councilman. In Fortson there was substantial equality of population in the senatorial districts, while here the population of the boroughs varies widely. If a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow. But on the assumption that Reynolds v. Sims controls, the constitutional test under the Equal Protection clause is whether there is an "invidious" discrimination. 377 US, at 561, 12 L. Ed. 2d at 527.
>
> * * *
>
> The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. As the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial or political elements of the voting population, it will be time enough to consider whether the system still passes constitutional muster. (Emphasis supplied.)

Initially, petitioners complain that respondents rested their case following petitioners' presentation of evidence in the trial court and therefore failed to justify population disparities among the five districts. The question presented to the trial court and now the Court of Appeals for the Fifth Circuit is whether Act 1739 is facially discriminatory and unconstitutional.

Mathematical equality in local governmental units, and the formation of innovative ideas to run them, are not now and never have been constitutionally foreclosed. The application of the Fourteenth Amendment to local governmental units was inaugurated in *Avery* v. *Midland County,* 390 U.S. 474, 20 L.Ed.2d 45, 88 S.Ct. 1114, wherein this Court said:

> This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems. Last Term, for example, the Court upheld a procedure for choosing a school board that placed the selection with school boards of component districts even though the component boards had equal votes and served unequal populations. Sailors v. Board of Education, 387 U.S. 105, 18 L. Ed. 2d 650, 87 S. Ct. 1549 (1967). The Court rested on the administrative nature of the area school board's functions and the essentially appointive form of the scheme employed. In Dusch v. Davis, 387 U.S. 112, 18 L. Ed. 2d 656, 87 S. Ct. 1554 (1967), the Court permitted Virginia Beach to choose its legislative body by a scheme that included at-large voting for candidates, some of whom had to be residents of particular districts, even though the residence districts varied widely in population.

> The Sailors and Dusch cases demonstrate that the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government. We will not bar what Professor Wood has called "the emergency of a new ideology and structure of public bodies, equipped with new capacities and motivations . . . ." R. Wood, 1400 Governments, at 175 (1961). Our decision today is *only* that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among *single-member* districts of substantially unequal population. (Emphasis supplied.)

When trial in this case was held on December 14, 1971, this Court had previously approved just such a local election plan as that set forth in Act 1739, in cases such as *Dusch* v. *Davis, supra,* and *Fortson* v. *Dorsey,* 379 U.S. 433 (1963). Furthermore, at the time of trial the Court of Appeals for the Fifth Circuit and courts within its supervisory jurisdiction had many times held that local election plans identical to, or nearly so, that promulgated by Act 1739 were legislatively and constitutionally permissible. *Davis* v. *Thomas County, Georgia,* 380 F.2d 93 (5th Cir., 1967); *Goldblatt* v. *City of Dallas,* 414 F.2d 744 (5th Cir., 1969); *Taylor* v. *Monroe County Board of Supervisors,* 394 F.2d 333 (5th Cir., 1968); and *Robertson* v. *Gallion,* 282 F.Supp. 157 (M.D. Ala., 1968).

The attack on Act 1739 was premature, for it was constitutional on its face. The only question re Act 1739 that can even be properly invoked against the election plan set forth in Act 1739 is whether following

the elections in 1972 and thereafter Act 1739 is used as a cloak for invidious discrimination.

Again quoting *Dusch, supra:*

> . . . As the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial or political elements of the voting population, it will be time enough to consider whether the system still passes constitutional muster.

No election had been held under Act 1739 at the time Judge Lynne, the trial judge, rendered his decision. No invidious discrimination could be proved. The respondents properly rested their case upon the conclusion of the testimony of complainants below, the petitioners here.

Secondly, the petitioners herein attempt to have this Court bypass the United States Court of Appeals for the Fifth Circuit, alleging that there is a conflict in opinions between the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Fifth Circuit.

(1) It is not now known whether there is a conflict between the circuits. In *McCain* v. *Lybrand* (No. 74-278) now before this Court on petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit, a panel of the Fourth Circuit approved an election plan for the governing body of Edgefield County, South Carolina, factually similar to that approved by District Judge Lynne on December 14, 1971, in this case. Judge Lynne based his opinion on the teachings in prior decisions of this Court, such as *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971), and *Dusch* v. *Davis, supra;* the Fifth Circuit Court of Appeals decision in *Davis* v. *Thomas County, supra;*

and the decision of the District Judge in *Robertson* v. *Gallion, supra.* Judge Lynne also had before him the Fifth Circuit opinion in *Taylor* v. *Monroe County Board of Supervisors, supra,* wherein the election scheme for the county governing body was the election of five supervisors from five malapportioned districts. Pursuant to *Avery* v. *Midland County, supra,* the Fifth Circuit ruled the existing apportionment unconstitutional and proceeded to suggest acceptable remedial measures (394 F.2d at 334), viz:

> This leaves to the governing authorities of the County two options. They may reapportion the five districts so as to leave each of them with a population substantially equal to that of the others, *or they may allow a supervisor to be chosen from each of the districts as presently constituted but by elections in which the voters of the entire county will participate, Dusch* v. *Davis,* 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.2d 656 (1967), cited with approval in *Avery* v. *Midland County, supra.* (Emphasis supplied.)

On January 3, 1972, a panel of the United States Court of Appeals for the Fifth Circuit struck down, in *Keller* v. *Gilliam,* 454 F.2d 55, a plan approved by a district court calling for election of county officials from five district with unequal population but at-large voting. In so doing, the panel attempted to distinguish *Dusch* v. *Davis, supra,* and *Fortson* v. *Dorsey, supra.* However, the panel in *Keller* v. *Gilliam* did not overrule or even mention its previous diametrically-opposite decisions in *Davis* v. *Thomas County, supra, Taylor* v. *Monroe County Board of Supervisors, supra,* and *Goldblatt* v. *City of Dallas, supra.* A conflict between the panels of the Fifth Circuit was created by *Keller* v. *Gilliam, supra.*

On March 20, 1972, *Peters* v. *Clark* was argued before a panel of the Fifth Circuit wherein the conflict was vigorously discussed. *Peters* v. *Clark* has not been decided by the Fifth Circuit; their dilemma is unresolved.

On October 3, 1973, in the unreported case of *F. D. Reese et al.* v. *Dallas County, Alabama,* Civil Action No. 7503-73-H, District Judge Brevard Hand had before him a challenge to the election plan for the governing body of Dallas County, Alabama, factually similar to that for Madison County, *Alabama,* in *Peters* v. *Clark.* In his order sustaining the constitutionality of the Dallas plan, Judge Hand relied on *Dusch* v. *Davis, supra, Goldblatt* v. *City of Dallas, supra,* and cases of similar import without mentioning *Keller* v. *Gilliam.* Thus Judge Hand implicitly recognized the predicament of the Fifth Circuit and invited that court's resolution of its conflict.

F. D. Reese v. *Dallas County* was appealed to the United States Court of Appeals for the Fifth Circuit. Tacitly recognizing the confusion generated by *Keller,* the Fifth Circuit Court of Appeals on its own motion heard the arguments of opposing counsel on May 29, 1974. The Fifth Circuit has not decided *Reese* v. *Dallas County.* That case still appears on its docket as No. 73-3756. The importance of both *Peters* v. *Clark* and *Reese* v. *Dallas County* was underlined in the opinion of District Judge Hand when he pointed out:

> Dallas County is one of thirty-five (35) counties in Alabama which operates under Laws requiring the election of County Commissioners who must reside within prescribed geographical districts but who must be elected by an at-large county vote. . . . Several of these counties relying on the controlling United States Supreme Court decision of *Dusch*

> v. *Davis, infra,* have had passed through the Alabama Legislature, Acts which will require district residence with at-large county elections.

The Fifth Circuit may and should decide *Peters* v. *Clark* in accord with its decisions prior to *Keller* v. *Gilliam*. If it does so decide, this case and *McCain* v. *Lybrand* will be in accord and therefore no conflict between circuits will appear. The Fifth Circuit should be given an opportunity to resolve its own conflicts before this Court entertains a petition under Section 1254(1), Title 28 U.S.C.

We emphasize that the next general election of commissioners of Madison County will not occur until November 1976, almost two years from now, and there is no compelling reason for not awaiting a decision by the Fifth Circuit.

Section 2101(e), Title 28 U.S.C. provides that application for certiorari before judgment in the Court of Appeals may be made at any time before judgment. However, Supreme Court Rule 20 provides:

> A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. (Citing cases.)

(2) It is abundantly clear from the decisions of this Court that units of local government are not to be straitjacketed in creating local governmental machinery to meet local needs, demands and problems. In Madison County, Alabama, 78% of the population lives in the City of Huntsville. This Court has consistently held that counties such as Madison may devise forms

of government which will recognize legitimate and important economic and other interests so long as there is no infringement of the constitutional rights of any voter. At-large elections with no residency requirements would probably result in the election of urban representatives with no knowledge of rural problems in the county. Each local governmental unit has its own peculiar problems. If the devised election plan passes constitutional muster on its face, the question remains whether it is constitutionally applied. In the application of the local election plan there may be constitutional questions raised, each of which may be and should be passed upon. Should this Court attempt to set down ground rules to cover all situations which ingenious litigants may envision, this Court would enter into a constitutional thicket which would confuse rather than enlighten.

We submit that each case should be decided on its own merits. The time for the decision of this case by this Court has not arrived, and may never arrive.

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

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Certificate of Service

The undersigned attorney for respondents hereby certifies that a true copy of the foregoing brief has been served upon Mr. Dieter J. Schrader, attorney of record for petitioners, by mailing a copy of same to him at his offices located at Suite 400, State National Bank Building, Huntsville, Alabama, 35801, with United States postage prepaid, this 19th day of December, 1974.

/s/ RALPH H. FORD